86-420 (1)

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RICHARD LANG, Petitioner,

v.

UNITED STATES OF AMERICA and REVENUE OFFICER ELIZABETH C. CAMP, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION PREVENTS THE GOVERNMENT FROM COMPELLING AN INDIVIDUAL HOLDING CORPORATE DOCUMENTS IN A REPRESENTATIVE CAPACITY TO PRODUCE THOSE DOCUMENTS WHEN THE ACT OF PRODUCTION WILL INCRIMINATE THE INDIVIDUAL PERSONALLY.*

* All of the parties in the United States Court of Appeals for the Fourth Circuit are listed in the caption.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 792 F.2d 1235 and is reprinted in the appendix (Appendix A, pp. 1a to 18a).

No. _____

IN THE
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October Term, 1985

RICHARD LANG, Petitioner,

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UNITED STATES OF AMERICA and REVENUE OFFICER ELIZABETH C. CAMP, Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

On June 4, 1986, the United States Court of Appeals entered Judgment and filed an Opinion enforcing the IRS summons in question.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 20 of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Richard Lang is President and 50% shareholder of KAL, Inc., a closely-held

corporation whose sole business is owning and operating an Aamco Transmission Center. The Internal Revenue Service began to investigate Mr. Lang after receiving a letter from a former employee of KAL, Inc. stating that Mr. Lang was "thought" to be taking cash out of the business. The I.R.S. was interested in determining whether Mr. Lang was in fact taking cash out of the business, and whether he was reporting the cash as income on his personal tax return. The I.R.S. considers criminal prosecution of Mr. Lang as a possible outcome of the investigation.

As part of the investigation, the agent in charge of the case received from KAL's attorney a number of corporate records. After the agent examined these documents, KAL's counsel terminated the audit. The agent then served Mr. Lang two summonses, one addressed to him personally and

one addressed to him as "President, KAL, Inc." The summons addressed to Mr. Lang personally requested that Mr. Lang produce personal bank records. The summons addressed to Mr. Lang as President of KAL demanded that Mr. Lang produce:

> (1) All bank statements and cancelled checks for the period 5/20/80 to 4/30/83 of business checking account # 301-509736 at Southern National Bank and any other checking account over which Richard Lang, President of KAL, Inc., has signature authority;
>
> (2) Passbook and/or quarterly statements of savings account # 302-509736 at Southern National Bank for the period 5/20/80 to 4/30/83;
>
> (3) All deposit slips to checking accounts including VISA and Master Charge receipts for period 5/20/80 to 4/30/83;
>
> (4) All repair order tickets written between 5/20/80 to 4/30/83 including but not limited to numbers 15001 - 20779;
>
> (5) Copies of checks deposited into business checking account between 5/20/80 to 4/30/83 as income;

> (6) Copies of all loan agreements by corporation to shareholders for period 5/20/80 to 4/30/83 and any and all loan agreements made by shareholders to the corporation.

Mr. Lang refused to produce the documents, most of which had not previously been inspected by the I.R.S. The agent initiated the current enforcement proceedings. In response to an order to show cause why the summonses should not be enforced, Mr. Lang argued that the act of producing the documents would incriminate him personally, and that this Court's decisions in Fisher v. United States, 425 U.S. 391 (1976), and United States v. Doe, 465 U.S. 605 (1984), therefore precluded the government from compelling him to perform the act of production.

The magistrate distinguished between Mr. Lang's act of producing personal documents and his act of producing corporate documents. Although the magistrate quashed

most of the summons for the personal documents as the act of producing them would be incriminating, he rejected Mr. Lang's assertion of the fifth amendment in the context of the act of producing KAL's records. The magistrate held that a person who holds corporate documents in a representative capacity has no fifth amendment right not to perform the act of producing corporate documents. The magistrate reasoned that Fisher and Doe did not apply to Mr. Lang's production of KAL's records because "in producing the records he would not be attesting to his personal possession of them, but to their possession by the corporation." The magistrate also concluded that this Court's decision in Curcio v. United States, 354 U.S. 118 (1954) required the custodian of corporate records to authenticate the records demanded by a subpoena, even when the records would person-

ally incriminate the custodian. The United States District Court for the Eastern District of North Carolina adopted the magistrate's opinion in its entirety.

On appeal, the United States Court of Appeals affirmed. The Court believed that neither Fisher nor Doe directly answered the question whether a custodian holding corporate documents may raise a personal fifth amendment claim when the act of producing these records would incriminate him personally. The Court recognized that the circuits have split over the application of Fisher and Doe to representative records-custodians; the Third Circuit has applied Fisher and Doe to one holding documents in a representative capacity, In re Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985), while the Fifth, Sixth, Ninth and Tenth Circuits have held that Fisher and Doe do not apply to one holding documents

in a representative capacity, In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985); In re Grand Jury Proceedings (Lincoln), 767 F.2d 1130 (5th Cir. 1985); United States v. Malis, 737 F.2d 1511 (9th Cir. 1984); In re Grand Jury Proceedings (Vargas), 727 F.2d 941 (10th Cir.), cert. denied, 105 S.Ct. 90 (1984).

The court rejected the reasoning of the Third Circuit, which held that as a general matter a custodian of corporate records cannot be compelled to make self-incriminating disclosures that are testimonial. The court also rejected the reasoning of the Fifth, Sixth, Ninth and Tenth Circuits, which absolutely preclude the assertion of a personal fifth amendment claim by one incriminated by the act of producing corporate records. Instead, the court adopted the rule recently articulated by the Second Circuit in In re Two Grand

Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985).

The court interpreted the Second Circuit's rule as a middle ground between the extreme approaches taken by the other circuits, under which one holding documents in a representative capacity may assert a personal fifth amendment claim in "the unusual circumstance" when the act of production would "automatically" incriminate the representative personally. The court concluded that this was not such an unusual case as Mr. Lang, by his act of producing the documents, would not "be attesting to his personal possession of them but to their possession by the corporation." 792 F.2d at 1241. The court then found that Mr. Lang did not dispute the existence of the summoned documents and their possession by the corporation - a finding that is not supported by the record. Finally, the

court concluded that, although Mr. Lang's production of the records would authenticate them, Mr. Lang could nonetheless be required to perform the act of production as the government could later authenticate the records through other means.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED THIS CASE IN A MANNER THAT CONFLICTS WITH DECISIONS OF THIS COURT.

A. The Fifth Amendment Prohibits The Government From Extracting Tacit Testimony By Compelling A Citizen To Perform The Act Of Producing Documents.

The fifth amendment provides that: "No person ... shall be compelled in any criminal case to be a witness against himself." This Court has made clear that the privilege protects an individual from being forced to provide testimony "which would furnish a link in the chain of evidence needed to prosecute the claimant for a

federal crime," Hoffman v. United States, 341 U.S. 479, 486 (1951), and that it is enough to raise a valid fifth amendment claim that the person reasonably believes that the testimony, or any fruits of the testimony, could be used in a later criminal prosecution. Kastigar v. United States, 406 U.S. 441, 445 (1972).

Until the decision in Fisher v. United States, 425 U.S. 391 (1976), the application of these principles to a subpoena duces tecum or other government demand for the production of documents rested upon the notion that the fifth amendment protected the contents of personal documents, Boyd v. United States, 116 U.S. 616 (1886), but did not protect the contents of documents belonging to a collective entity. Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S.

361 (1911); Hale v. Henkle, 201 U.S. 43 (1906).

In Fisher this Court rejected the reasoning of Boyd, and held that the contents of voluntarily created documents were not protected by the fifth amendment as there had been no governmental compulsion in their creation. The opinion in Fisher recognized, however, that:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It would also indicate the taxpayer's belief that the papers are those described in the subpoena.

425 U.S. at 410. The Court concluded that the application of this principle should be made on a case-by-case basis, and held that an individual required to produce documents that he neither created nor owned, and

which concededly existed, did not have a valid fifth amendment claim.

The principle articulated in Fisher was further refined in United States v. Doe, 465 U.S. 605 (1984), in which the Court held that a sole proprietor could not be compelled to perform the act of producing documents used in his business as the act of producing those documents would tacitly admit the existence, authenticity and Doe's possession of the documents, all of which could serve as links in the chain of evidence against Doe. Significantly, the Court rejected the government's assertion that it would not use Doe's act of production against him; a formal grant of use immunity is required.

B. The Fifth Amendment's Proscription Of Compelled, Tacit Testimony Applies To The Act Of Producing Corporate Documents Held In A Representative Capacity.

The Court of Appeals erroneously concluded that neither Fisher nor Doe applied directly to this case as neither involved the production of corporate documents by one holding them in a representative capacity. It is clear, however, that the principle articulated in Fisher and Doe applies to any coerced action that has testimonial content. A person producing corporate documents tacitly admits the existence and authenticity of the documents, and that they are in his possession. That the custodian is acting as a "representative" does not alter the fact that the custodian is also tacitly demonstrating his own knowledge of and control over the documents.

To hold, as did the Court of Appeals, that one performing the act of production as a representative demonstrates only the corporation's possession of the documents and does not reveal anything about his own possession of them is to ignore reality. The capacity in which the custodian possesses the documents is only relevant to determining whether these tacit admissions are incriminating. The distinction between personal documents and corporate documents recognized in Bellis and other pre-Fisher cases, a distinction that is based on an analysis of the contents of the documents, simply is not determinative in an analysis of the incriminating nature of the act of production.

C. Mr. Lang's Production Of The Corporation's Documents Would Serve To Incriminate Mr. Lang Personally.

The Court of Appeal's failure to apply the analysis of Doe led it to erroneously

conclude that Mr. Lang's production of the subpoenaed documents would not implicate the fifth amendment, principally because Mr. Lang would be acting in a representative capacity. A proper application of Doe to the facts of this case reveals that Mr. Lang's act of producing the documents would serve as a link in the chain of evidence against him.

For example, production of records of "all" corporate bank accounts tacitly reveals the existence of corporate accounts of which the government does not have knowledge, or tacitly confirms that no additional accounts exist. Similarly, by producing "all" repair orders, Mr. Lang will tacitly testify as to the number of repair orders used during the relevant time period. In addition, Mr. Lang will be forced tacitly to admit that he possesses and controls the summoned documents, and is aware of their

contents, a fact that may be particularly incriminating if the contents reveal that repair orders and other documents have been fraudulently created.

Although some portion of these documents have previously been produced by the corporation, through its attorney, Mr. Lang has not produced any of these documents, nor is their existence conceded. The government clearly cannot force Mr. Lang to take the stand and testify as to the existence of various bank accounts and repair orders, his control of those documents, or their authenticity, nor should it be allowed to obtain this testimony by forcing him to perform the act of production.

Contrary to the analysis of the Court of Appeals, Mr. Lang's status as a representative of KAL does not require that the act of production "automatically" incriminate him before the fifth amendment applies.

792 F.2d at 1241. It is enough under Doe that Mr. Lang's risk of self-incrimination is not "trifling or imaginary." Doe at 614, n.13. When, as here, the person required to produce the corporate documents is the half owner and chief operating officer of a small closely-held corporation whose sole business is operating a single Aamco Transmission Center, and is the target of the government's investigation, the risk that the custodian's act of producing the documents will incriminate the custodian is seldom, if ever, trifling or imaginary.

Finally, the Court of Appeals recognized that Mr. Lang's production of these documents would serve to authenticate them, which would be a link in the chain of evidence against him. The Court then held that Mr. Lang's fifth amendment right would not be violated as the government could

find another witness to authenticate the records. A proper application of Doe, however, reveals that Mr. Lang's claim that his act of production will authenticate documents that will later be used against him is not answered by the fact that the government may be able to authenticate these records through another witness. Doe explicitly rejected this type of "constructive use immunity." Doe at 616. A formal grant of use immunity is required before Mr. Lang can be forced to authenticate the records through his act of producing them.

D. The Court Of Appeals' Rejection Of Mr. Lang's Assertion Of The Fifth Amendment Conflicts With The Decisions Of This Court And Should Be Reviewed.

In determining that tacit, incriminating admissions inherent in the act of producing corporate documents do not warrant the same fifth amendment protection as is granted the act of producing personal docu-

ments, the Court of Appeals decided this case in a manner that conflicts with this Court's decisions in Fisher v. United States, 425 U.S. 391 (1976), and United States v. Doe, 465 U.S. 605 (1984). This Court should grant the petition and review the decision of the Court of Appeals.

II. THE COURT OF APPEALS DECIDED THIS CASE IN A MANNER THAT CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

As the Court of Appeals recognized, there is currently a split in the circuits on the issue whether the fifth amendment analysis employed in Doe and Fisher applies to one who is personally incriminated by performing the act of producing documents held in a representative capacity. The Third Circuit, sitting en banc, has ruled that one in Mr. Lang's position may raise a personal fifth amendment claim when requested to perform the act of producing

corporate documents. In re Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985) (en banc). The Second Circuit has adopted a modified application of Doe, allowing a representative to raise a personal fifth amendment claim in extraordinary circumstances. In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985). The Fourth Circuit has now adopted the Second Circuit's analysis. The Fifth, Sixth Ninth and Tenth Circuits have refused to apply Doe to one holding documents in a representative capacity. In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985); In re Grand Jury Proceedings (Lincoln), 767 F.2d 1130 (5th Cir. 1985); United States v. Malis, 737 F.2d 1511 (9th Cir. 1984); In re Grand Jury Proceedings (Vargas), 727 F.2d 941 (10th Cir.), cert. denied, 105 S.Ct. 90 (1984).

The Fourth Circuit recognized that the result reached in this case would be different under the analysis used by the Third Circuit. In essence, therefore, under the current state of the law, the scope of protection granted by the fifth amendment to one who holds documents in a representative capacity varies from circuit to circuit. This Court should grant the petition for a writ of certiorari to resolve the clear split in the circuits over the scope of protection afforded by the fifth amendment to one required to incriminate himself by performing the act of producing documents held in a representative capacity.

III. THE DECISION OF THE COURT OF APPEALS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Although petitioner believes that this Court's decisions in Fisher and Doe are clearly applicable to one holding documents

in a representative capacity, should there be any question on this point, the issue should be resolved by this Court. The federal government serves numerous subpoenas duces tecum and I.R.S. summonses upon corporate representatives, and often the subpoenaed representative is the target of the government's investigation into alleged criminal conduct. As is demonstrated by the spate of recent decisions by the Courts of Appeals, the application of the fifth amendment to these subpoenas is an issue that has engendered repeated litigation, which has not yet settled the issue. Accordingly, this Court should grant the petition and resolve this issue.

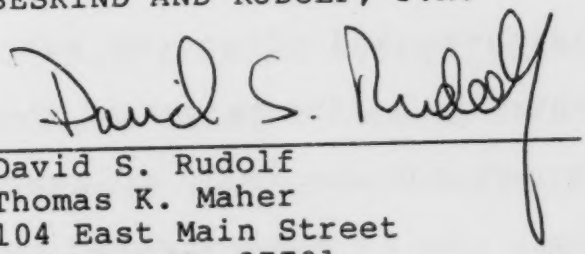
CONCLUSION

Petitioner respectfully that this Court issue a writ of certiorari to the United States Court of Appeals for the

Fourth Circuit to review that court's decision enforcing the summons served upon petitioner.

Respectfully submitted,

BESKIND AND RUDOLF, P.A.



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1699 (L)

United States Of America and
Revenue Officer Elizabeth C.
Camp,

Appellees,

versus

Richard Lang,

Appellant.

No. 85-1700

United States Of America and
Revenue Officer Elizabeth C.
Camp,

Appellees,

versus

Richard Lang, President,
KAL, Inc., and KAL Inc.,

Appellants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge. (C/A 84-1111 & C/A 84-1112)

Argued: December 3, 1985
Decided: June 4, 1986

Before RUSSELL and CHAPMAN, Circuit Judges, and SWYGERT, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

David S. Rudolf and Thomas Maher (Beskind and Rudolf) for Appellant; Rudolph A. Renfer (United States Attorney) for Appellees.

SWYGERT, Senior Circuit Judge.

Taxpayer Richard Lang appeals from a June 13, 1985 order of the United States District Court for the Eastern District of North Carolina, partially enforcing two Internal Revenue Service ("IRS") summonses. Lang requests that this court deny enforcement of the summons served on him in his representative capacity as president of a small, closely-held corporation. He argues that his fifth amendment right protects him from producing the corporation's documents because it would incriminate him. In addition, Lang requests denial of the summons served upon him personally, on the basis that the

summons seeks documents containing information already in the possession of the IRS. For the reasons stated below, we hold that the district court's order enforcing the summonses is correct and we affirm.

I

Lang is a fifty percent shareholder and president of KAL, Inc., which operates an Aamco transmission shop in Raleigh, North Carolina. A former employee mailed a letter to the IRS, alleging that Lang may have been removing sums of money from the business. IRS Agent Elizabeth C. Camp was assigned to conduct an investigation during the summer of 1983. The IRS requested, and the taxpayer provided, his personal bank records and statements for his E. F. Hutton brokerage account for 1981. The agent examined the documents, took notes and photocopied portions of the records, and returned them. The initial analysis by Camp was that the records showed Lang to

have deposited to his bank account in excess of $20,000 more than he had reported on his 1981 income tax return. The explanation Lang gave for the discrepancy was that much of the money deposited in his personal account was repayment of loans; the explanation was not satisfactory to the IRS.

The agent expanded her audit to include KAL, Inc. in order to determine whether the taxpayer was removing money from the business without reporting it on the corporate tax returns. In response to the agent's request, William Pinna, tax counsel for KAL, Inc., provided certain documents. From her examination, Camp suspected that Lang was voiding repair orders (which would result in the corporate showing "no, or zero, sale" for each voided order) and then depositing the payments from those repair orders into his personal bank account. According to Lang, the agent concluded that the business underreported its gross income

by approximately eight percent in 1981 and four percent in 1982.

At this point, Pinna refused to permit Camp further access to the records. The agent thereupon issued the two summonses in question. One summons was issued to the taxpayer individually and required him to produce his cancelled checks and bank statements for his Southern National Bank checking account for 1981-83, and the statements for his E. F. Hutton brokerage account for the same years.

The second summons was addressed to Lang as "President, KAL, Inc." and required him to furnish the corporation's records concerning its checking and savings accounts at Southern National, all deposit slips to any checking account, all repair order tickets, copies of all checks deposited to the KAL, Inc. account, and copies of all loan agreements. Lang refused to produce the summoned documents, and Camp began enforcement proceedings.

Upon taxpayer's refusal to comply with the summonses, the Government petitioned the district court for enforcement. In response to the court's order that he "show cause" why the summonses should not be enforced, Lang filed a response raising a number of arguments. Lang refused to furnish the documents on the grounds that (1) performing the act of production would tend to incriminate himself; (2) the information requested was already in Camp's possession by virtue of her earlier examination; and (3) a referral to the Department of Justice had been made.

Magistrate Wallace Dixon conducted an evidentiary hearing at which Camp and Pinna testified. Camp testified that she made notes during her earlier examination of the KAL, Inc. records and photocopied portions which she thought were necessary. Counsel for Lang requested that the notes be produced so that he could cross-examine Camp concerning the information she had in

her possession and which might be included in the summonses. The court sustained the Government's objection to discovery from the notes and declined to review the material in camera.

Following that hearing, the magistrate filed a memorandum in which he recommended that the summonses be enforced in part. With respect to the summons issued to Lang individually, the magistrate recommended that it be quashed with the exception of the 1981 records concerning his bank and brokerage accounts which had previously been furnished the agent. With respect to the summons issued to Lang as president of KAL, Inc., the magistrate recommended that it be enforced except in regard to checks deposited into the corporate bank account because neither Lang nor tne corporation kept such records--the IRS would therefore be required to summon the bank for that information.

In analyzing the taxpayer's claim of fifth amendment privilege, the magistrate distinguished between the effect of the privilege on the summons addressed to Lang in his individual capacity and on the summons addressed to Lang in his representative capacity. As to the individual summons, he found that Lang could refuse to perform the act of producing personal and financial documents when the production itself would incriminate him. Under this rationale, Lang's being forced to furnish records not previously viewed by Camp would provide the Government information of which it was previously unaware and require Lang to admit its existence and his possession of those records in violation of his fifth amendment privilege against self-incrimination. On the contrary, Lang's production of records which Camp had already viewed could not rise to the level of a testimonial act and would not violate

any privilege. As to the summons issued to Lang in his representative capacity, the magistrate found that Lang had no fifth amendment right to refuse to produce the records of KAL, Inc.

On June 13, 1985 the district court, having conducted a de novo review of the record, concluded that the magistrate had correctly ruled on all points and adopted the magistrate's recommendation as its own. The court ordered the summonses enforced in accordance with the magistrate's recommendations. The taxpayer appeals.

II

The first issue this case raises, and the most significant, is whether an individual holding corporate documents in a representative capacity may assert a fifth amendment privilege against producing those documents in response to a subpoena. Circuits addressing the question have split over the answer. Some confusion exists in the wake of recent Supreme Court decisions

on the relationship of the fifth amendment to business-related documents.

Traditionally, the fifth amendment privilege could be claimed to shield production of private documents belonging to a natural person, Boyd v. United States, 116 U.S. 616 (1886), but could not be claimed by an organized entity like a corporation, Hale v. Henkle, 201 U.S. 43 (1906). Corporate officials seeking to claim an individual fifth amendment privilege were denied protection because of the policy that a custodian should not be able to shield the collective entity (which has not fifth amendment privilege) from governmental scrutiny by asserting a personal right. United States v. White, 322 U.S. 694, 699 (1944); Wilson v. United States, 221 U.S. 361, 378-79 (1911). Under this rule custodians assume the rights, duties, and privileges of the artificial entity of which they are agents or officers and they are bound by its obligations. The

official records and documents that are held by them in a representative rather than personal capacity can not be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. White, 322 U.S. at 699.

This traditional refusal to grant a fifth amendment privilege to individuals holding documents in a representative capacity reflected the importance courts attached to the notion of a privacy interest in the contents of certain papers. Under this analysis, documents held in a representative capacity reflected no privacy expectation on the part of the representative, unlike personal records. United States v. Bellis, 417 U.S. 85, 91-92 (1974). However, this clear division between production of papers with personal content and corporate content has been blurred by recent court decisions shifting the focus away from the privacy interest of

an individual in his personal papers and toward protection against testimonial self-incrimination. United States v. Nobles, 422 U.S. 225, 233 n.7 (1975); Fisher v. United States, 425 U.S. 391, 401 (1976); United States v. Doe, 465 U.S. 605 (1984).

Under the modern analysis, it is irrelevant to the issue whether the documents in question are privately owned by the individual being subpoenaed or in his possession; the compelled production, identification, and authentication of incriminating materials by the possessor will incriminate him whether or not the documents are his. United States v. Cohen, 388 F.2d 464, 468 (9th Cir. 1967).

Although the content of a document may not invoke the fifth amendment privilege, the act of producing the document may: the "act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of

the papers produced." Fisher, 425 U.S. at 410. Testimonial self-incrimination may be involved where enforcement of a subpoena would compel the holder to admit that the records exist, that they were in his possession, and that they are authentic. The risk of incrimination must be "substantial and real" and not "trifling or imaginary." Where the incriminating effect does exist, production of the documents is privileged and cannot be compelled without a statutory grant of use immunity. Doe, 465 U.S. at 617.

Thus, while Bellis may have settled the question of whether a custodian of a collective entity's documents has a fifth amendment privilege with respect to the incriminating contents of those documents (holding that the custodian cannot claim such a privilege), id. at 100, the Supreme Court did not settle the question whether there might be a communicative and incriminatory effect of the act of

production itself. In Fisher, the documents in question were prepared by accountants and were subpoenaed from taxpayers' attorneys. In Doe, the owner of sole proprietorships was served with subpoenaes demanding business records of the companies. Neither case dealt precisely with the situation here--corporation records held by its president in a representative capacity, raising his own individual fifth amendment privilege.

Circuits have split over the proper application of Fisher and Doe to the question raised in the instant matter. The majority of the circuits have held that the custodian of corporate records enjoys no right to resist a subpoena of his records even when incriminating to the custodian. In the first post-Doe decision, the Tenth Circuit held that an attorney holding client files in a representative capacity for another could not assert a fifth

amendment privilege. The court underlined that the privilege had not been extended to the custodians of corporate documents or those belonging to other collective entities by the recent Supreme Court decisions. In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 945 (10th Cir. 1984), cert. denied, 105 S. Ct. 90 (1984). The first Circuit is in accord. In considering whether a physician subpoenaed to turn over appointment logs may raise a fifth amendment privilege, the court held that corporate records incriminating to the custodian may be subpoenaed, and only personal, self-created business records in the possession of their maker may be protected.

Similarly, the en banc decision in the Sixth Circuit reaffirmed the rule that a custodian of institutional records cannot claim the fifth amendment privilege. In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985). The Fifth

Circuit considered the assertion of a privilege by an individual subpoenaed to produce records of multiple organizations, and held that Doe was not applicable to the records of a collective entity held in a representative capacity. In re Grand Jury Proceedings (Lincoln), 767 F.2d 1130, 1131 (5th Cir. 1985). The Ninth Circuit also reached the same conclusion in United States v. Malis, 737 F.2d 1511, 1512 (9th Cir. 1984).

Only the Third Circuit in In re Grand Jury Matter (Brown), 768 F.2d 525, 528 (3d Cir. 1985) (en banc), held that as a general matter a custodian of corporation records (specifically a sole stockholder of a professional corporation) cannot be compelled to make self-incriminating disclosures that are testimonial, i.e., communicative or assertive in nature. The dissent, however, criticizes the Third Circuit majority for having assumed that Fisher and Doe overruled Bellis sub

silentio, and argues that allowing representatives of corporations to assert their own personal privilege would effectively immunize the entity from subpoena. Instead, the dissent argues, the custodian waives to a limited extent his fifth amendment right upon assuming the duties of his office. Id. at 536, 538. See also In re Grand Jury Empanelled 3-23-83, 773 F.2d 45 (3d Cir. 1985).

It is the view of this court that the most reasonable rule to establish for this circuit is that put forward to date by the Second Circuit.

In the recent decision of In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985), the Second Circuit considered the case of a custodian of records of a corporation who claimed that the effect of a subpoena was to compel his testimony in violation of the fifth amendment "act of production" doctrine. The corporation had three shareholders, but

was essentially a one-man operation, because the custodian was the corporation's majority shareholder and its sole operating officer and director. In some respects, the Second Circuit decision agrees with the majority of other circuits: it holds that the custodian in the case before it had no fifth amendment right to stop the corporation from producing records. It bases the holding on its conclusion that: "Normally a corporate representative or agent cannot claim a fifth amendment privilege against producing corporate documents, regardless of whether the corporation is large or small." Id. at 56. But in distinction to the analysis employed by other circuits, the Second Circuit goes further, to caution that:

> In certain limited circumstances, however, an individual may have a fifth amendment privilege against being personally compelled to produce corporate documents. As explained in Fisher v. United States, 425 U.S. 391 (1976), the act of producing documents may constitute personal testimony

> concerning the documents' existence, their possession or control, or the fact that the one producing them believes them to be the documents described in the subpoena. When this testimony would be self-incriminating, one has a personal fifth amendment privilege to refuse to comply with a subpoena requesting production.

Id. at 57.

The Second Circuit stresses that it is only in the unusual circumstance where the corporation's custodian of records would incriminate himself if he were to act or produce the company's records that the privilege may be asserted. The individual must be personally compelled to produce and authenticate corporate records and those acts must be self-incriminatory. In re Grand Jury Subpoenas Issued to Thirteen Corporations, 775 F.2d 43, 46 (2d Cir. 1985). In the typical case, when an employee produces his company's records, he is not attesting to his personal possession of them, but to their existence and possession by the corporation. Even where

an individual may assert his own privilege, the corporation cannot hide behind the fifth amendment to avoid it because the corporation itself has no fifth amendment privilege. In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d at 57.

When applied in practice, the Second Circuit approach does not allow a corporation to frustrate legitimate governmental regulation. In United States v. Barth, 745 F.2d 184 (2d Cir. 1984), cert. denied, 105 S. Ct. 1356 (2d Cir. 1985), as president of five small corporations, Barth refused on the grounds of self-incrimination to testify about what corporate books were kept or who was responsible for keeping them. Instead, Barth's attorney furnished the Government with a list of employees who had knowledge about the records. The listed employees themselves then appeared by counsel to inform the court that each of them intended to invoke his own privilege. The judge

ordered the corporation to comply with the summons by producing someone--any knowledgeable employee, or even a new agent--to testify about the records. The judge made it clear that the basic obligation of the corporation was to make every reasonable effort to obey. Id. at 189.

We agree with the Second Circuit's approach: the basic rule of Bellis continues after Doe, and normally a corporate representative or agent cannot claim a fifth amendment privilege against producing corporate documents. There will be rare occasions where an individual's production of those documents may amount to testimonial self-incrimination. In those limited circumstances, the individual has a personal fifth amendment privilege, but the corporate must comply with the summons through some other person.

Our final task is to apply this rule to analyze whether the tacit averments of

taxpayer Lang are both "testimonial" and "incriminating" so as to fall into that narrow situation where he may invoke a fifth amendment privilege. We apply by analogy the analysis used by the Supreme Court in other contexts.

The Court considers whether the act of production may constitute personal testimony conceding the document's existence, possession, or control. First, as to possession and existence, the court must determine whether the existence and location of the papers is a foregone conclusion. In Fisher the papers at issue were of a kind usually prepared by an accountant working on a client's tax return, so, therefore, the taxpayer added little or nothing to the sum total of the Government's information by conceding that he in fact had the papers. The Court specifically noted that it had time and again allowed subpoenae against the custodian of corporate documents or those

belonging to other collective entities over claims that the documents would incriminate the custodian despite the fact that producing the documents tacitly admits their existence and location in the hands of their possessor. Fisher, 425 U.S. at 411.

Second, as to authentication the court must determine whether responding to a subpoena would authenticate the work papers, whether threat of producing the documents constitutes testimony that the producer believes them to be the documents described in that subpoena. In Fisher the taxpayer did not prepare the papers and could not vouch for their accuracy. The taxpayer was no more competent to authenticate the reports by producing them then he would be to authenticate them if testifying orally. The custodians of corporate, union, or partnership records have been ordered to respond to a subpoena for the business' books even though doing

so involve a "representation that the documents produced are those demanded by the subpoena." Id. at 412, citing Curcio v. United States, 354 U.S. 118, 125 (1957).

In the instant case, the district court correctly concluded that Lang's act of producing corporate documents would not amount to testimonial self-incrimination by proving possession, existence, or authentication. The subpoena was directed to Lang in his capacity as president of K.A.L. and, as such, in providing the records he would not be attesting to his personal possession of them but to their possession by the corporation, which can claim no fifth amendment privilege.

Lang's production of repair orders, bank account statements, and shareholder loan agreements is hardly incriminating here. Lang does not dispute the existence of any of the records he is required to produce or that they are in the possession of the corporation. Indeed, the IRS agent

had been given access to and has examined some or all of the records except for the loan agreement between the taxpayer and the corporation (and she had sufficient prior knowledge about those agreements to make a specific request for them). Lang's act of producing those records would add little or nothing to the sum total of the Government's knowledge of the existence and location of the summoned records.

Finally, because Agent Camp can identify the records, the Government need not rely on Lang's act to verify that the documents are in fact what they purport to be. This is not a case where the custodian is incriminated automatically by demonstrating his knowledge or control of the records, as in In re Grand Jury Subpoenas Duces Tecum, 722 F.2d 981, 987 (2d Cir. 1983) (corporate officer may refuse to produce corporate records when the mere fact of possession is incriminating). Nor is this a case where

the Government is clearly subpoenaing the records in order to have the custodian of records authenticate them through production (condemned in United States v. Porter, 711 F.2d 1397, 1401 (7th Cir. 1983)).

We cannot agree with Lang that the district court ruled that production would not incriminate Lang solely because he was acting in a representative capacity. Instead, the court explicitly considered whether production would have testimonial significance by showing existence or possession or authentication. The court concluded that enforcement of the summons to Lang to produce KAL's business records would not violate his fifth amendment rights. We agree. While in a rare case an individual acting in a representative capacity may be able to assert a fifth amendment privilege--and force the corporation to appoint another person to produce the documents--this is not that

unusual case. The court's order enforcing the summons addressed to Lang in his representative capacity is correct.

II

The only issue remaining is appellant's claim that the district court erred in holding that the IRS summons did not require production of information already in the Government's possession and that enforcement of the summons did not violate the prohibition against second inspections contained in section 7605(b) of the Internal Revenue Code. We find no merit to the claim.

Section 7605(b) provides, as to restriction on time and place of examination of records, that

> No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

There was no re-examination of Lang's records within the meaning of that section; the examination had never been closed. The agent was summoning the documents for a permissible "second look." As this court recently pointed out in United States v. Morgan, 761 F.2d 1009, 1011 (4th Cir. 1985), section 7605(b) prohibits only unnecessary audits and second inspections without notice after the IRS has completed the first audit or investigation to determine the taxpayer's correct liability. Beyond the question of what harm is suffered by Lang in the first place, there is nothing in the law to prohibit the IRS agent from reviewing his records for the different and additional purpose of comparing the corporate and individual documents. The district court's order enforcing the summons addressed to Lang individually is correct.

Accordingly, the decision of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

UNITED STATES OF AMERICA and Revenue Officer ELIZABETH C. CAMP,	)	
Petitioners,	)	
v.	)	No. 84-1111-CIV-5
RICHARD LANG,	)	
Respondent.	)	

UNITED STATES OF AMERICA and Revenue Officer ELIZABETH C. CAMP,	)	
Petitioners,	)	
v.	)	No. 84-1112-CIV-5
RICHARD LANG, President of KAL, and KAL, INC.,	)	
Respondents.	)	

O R D E R

On 5 April 1985 Magistrate Wallace W. Dixon filed his memorandum and recommendation with regard to petitions by the United States of America to enforce

Internal Revenue Service summonses against Richard Lang, individually, and Richard Lang, as president of KAL, and KAL, INC. Respondent, Richard Lang, has filed objections to that part of the recommendations of the magistrate requiring him as president of respondent KAL, INC., to produce certain records of the corporation and to the finding by Magistrate Dixon that certain information is not already in the possession of the IRS. Upon a de novo review of the record directed toward the objections filed by respondent, Richard Lang, the court is convinced that the recommendation of Magistrate Dixon is, in all respects, in accordance with law. Therefore, the objections of Richard Lang are overruled, the court adopts the recommendations of Magistrate Dixon as its own, and for the reasons set forth in his memorandum, it is hereby ORDERED:

1. With respect to the summons directed to the respondent, Richard Lang as president of KAL, INC.:

a. that the summons be quashed with respect to the request to produce copies of checks deposited into KAL's business checking account (other than any check deposited therein which has been returned to KAL or Richard Lang as maker);

b. that the summons otherwise be enforced.

2. With respect to the summons directed to respondent, Richard Lang, individually:

a. that the summons be enforced as to the requested bank records for Southern National Bank account number 301-152632;

b. that the summons be quashed as to any other bank records for the calendar years 1981-83 for which respondent, Richard Lang,

individually, has signature authority and for E. F. Hutton account number R 30 07497 62 for the calendar years 1982-83;

c. that the summons be enforced with respect to the specified Southern National Bank account for the year 1981 with the exception of bank statements dated 7/22/81, 8/21/81, 10/22/81, 1/22/82 and be enforced with respect to the E. F. Hutton account for the year 1981.

This 13 June 1985.

W. EARL BRITT
United States District Judge

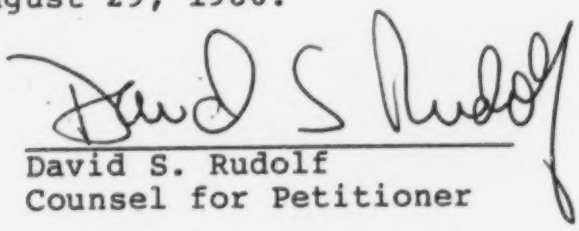
CERTIFICATE OF SERVICE

I, David S. Rudolf, a member of the Bar of the Supreme Court of the United States and counsel of record for Richard Lang, petitioner, hereby certify that on August 29, 1986, pursuant to Rule 28, Rules of the Supreme Court, I served copies of the foregoing Petition for Writ of Certiorari on the opposing party as follows:

On Respondent United States of America by depositing three copies in the United States Post Office in Durham, North Carolina, with first class postage prepaid, properly addressed to: Solicitor General, Department of Justice, Washington, D.C. 20530. On Respondent Revenue Officer Elizabeth C. Camp, by depositing three copies in the United States Post Office in Durham, North Carolina, with first class postage prepaid, properly addressed to: Rudolph A. Renfer, Assistant United States Attorney, Office of the United States Attorney for the Eastern District of North Carolina, Federal Building, Raleigh, North Carolina 27602.

I further certify that all parties required to be served have been served.

Dated, August 29, 1986.



David S. Rudolf
Counsel for Petitioner

Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-420

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD LANG, PETITIONER

v.

UNITED STATES OF AMERICA AND
REVENUE OFFICER ELIZABETH C. CAMP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that he may resist an Internal Revenue Service summons for corporate records on the ground that the act of producing them would incriminate him.

1. Petitioner owned 50% of the stock of KAL, Inc., a corporation. Respondent Camp, a revenue agent, was conducting an investigation to determine petitioner's and the corporation's correct federal income tax liabilities. Petitioner was served with an Internal Revenue Service summons addressed to him as "President, KAL, Inc.," requiring him to produce, for inspection by the IRS, corporate records that respondent Camp had already partially examined. In the summons enforcement proceeding, petitioner's argument that his act of production would incriminate him

was unsuccessful. The court of appeals affirmed the order enforcing the summons (Pet. App. 1-18).[1]

In affirming the enforcement order, the court of appeals noted that this Court, in a long line of decisions including *Bellis* v. *United States*, 417 U.S. 85 (1974), has held that the books and records of a collective entity such as a corporation or partnership cannot be insulated from production by a claim of privilege on the part of their custodian (Pet. App. 7a-9a). The court of appeals also observed that this Court, in *United States* v. *Doe*, 465 U.S. 605 (1984), recognized for sole proprietors a Fifth Amendment privilege against compelled self-incrimination through the testimonial act of producing the records of the business, and that the circuits have split over whether the privilege recognized in *Doe* extends to the custodian of corporate records (Pet. App. 9a-10a).[2] The court of appeals rejected the majority view that an individual may never invoke the privilege as a basis for failure to produce corporate documents held in a representative capacity. It agreed instead with the Second Circuit (*In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (1985); *In re Grand Jury Subpoenas Issued to Thirteen*

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[1]The court also affirmed the lower court's order directing petitioner to respond to a summons issued to him personally for the production of his checking and brokerage account records. Petitioner does not challenge that ruling in his petition. We have been advised that petitioner has complied with that summons, and thus the order enforcing it is now moot.

[2]Compare *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir.), cert. denied, 469 U.S. 819 (1984); *United States* v. *Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984); *In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130, 1131 (5th Cir. 1985); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir. 1985) (en banc), cert. denied, No. 85-658 (Dec. 16, 1985); *In re Grand Jury Subpoena*, 784 F.2d 857 (8th Cir. 1986), cert. granted *sub nom. See* v. *United States*, No. 85-1987 (Oct. 6, 1986); and *In re Grand Jury Subpoena Duces Tecum (Ackerman)*, 795 F.2d 904 (11th Cir. 1986), with *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985) (en banc).

Corporations, 775 F.2d 43, 46 (1985), cert. denied, No. 85-1051 (Mar. 24, 1986)) that an individual may invoke the privilege when the subpoena directs him personally to produce the documents and the act of production would be self-incriminatory (Pet. App. 12a). The court then affirmed the district court's factual determination that petitioner's act of producing the corporate records would not rise to the level of testimonial self-incrimination (*id.* at 14a-16a).

2. Petitioner contends that the summons at issue here should have been quashed because the act of producing the requested documents would incriminate him. He seeks certiorari to resolve the conflict that exists in the circuits regarding the scope of a corporate officer's privilege vis-a-vis corporate records. This case, however, does not present that conflict, which presumably will be resolved in *See* v. *United States, supra*. Petitioner received the benefit of the most favorable rule that any circuit has applied to privilege claims by individuals holding corporate documents in a representative capacity, *i.e.*, that he could invoke the privilege if he could show that the act of production would be self-incriminatory.[3] The courts below rejected his showing. Instead, they found that petitioner's act of producing the corporate records would not rise to the level of testimonial self-incrimination, because the existence and location of the records were a "foregone conclusion" (*Fisher* v. *United States*, 425 U.S. 391, 411 (1976); Pet. App. 14a-15a), and

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[3]The court of appeals did not adopt the position suggested in dictum by the Third Circuit in *In re Grand Jury Matter (Brown), supra*, and *In re Grand Jury Empanelled 3-23-83*, 773 F.2d 45 (1985), that the custodian of corporate records may invoke the privilege whether or not the subpoena is directed to him personally (see Pet. App. 10a-11a). Because the subpoena in this case was directed to petitioner personally, however, he was given the same right as the subpoenaed individuals in the two Third Circuit cases: an "opportunity to establish that production and authentication would tend to incriminate him" (*Brown*, 768 F.2d at 529; see *Grand Jury Empanelled 3-23-83*, 773 F.2d at 47).

because the records could be authenticated by persons other than petitioner (Pet. App. 16a).

The factual findings below are based on the particular circumstances of this case and therefore do not warrant review by this Court. Even if review were granted, *Doe* indicates that this Court would accept the lower courts' determination that the act of production would or would not be self-incriminatory, "unless it has no support in the record" (465 U.S. at 614). Because the court of appeals resolved the central legal issue in petitioner's favor and based its ultimate rejection of his privilege claim on factual findings peculiar to this case, the result would be the same, no matter what the ultimate outcome of *See*. There is therefore no need for the Court to hold this petition pending the decision in *See*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

DOJ-1986-10